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The Malaysian COVID-19 Act 2020
Impact on Construction Contracts

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On 23 October 2020, the long-awaited Temporary Measures For Reducing The Impact Of Coronavirus Disease 2019 Act (COVID-19) Act 2020 came into force. The main objective of this Act is to "*provide temporary measures to reduce the impact of COVID-19*" – the impact of which mostly arises out of the restrictions under the Movement Control Order (MCO).

Central to the Act is Section 7, which bars the enforcement of a contractual right against a defaulting party if such default arises out of the inability of the defaulting party to perform a contractual obligation. This specific section will have a retrospective effect from 18 March 2020 and will apply until 31 December 2020, unless extended by order published in the Gazette.

The impact of the COVID-19 Act on construction contracts will be discussed in this alert, in particular, the effect of Section 7 and how it may act as a statutory force majeure regime, its applicability, as well as potential issues and challenges arising from the Act.

Section 7 – Statutory Force Majeure Regime?

Force majeure is a creature of contract. Hence, whether delays or disruptions caused by the pandemic amounts to a Force majeure event turns to the interpretation of the relevant clause in the contract, as well as the consequences thereof. In this regard, there are commercial and even construction contracts with very bare force majeure clauses that may not include the pandemic as a force majeure event. This issue has amongst others, led to a call on the Malaysian Government to introduce an Act to address the issue, as was done in Singapore.

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On the surface, the COVID-19 Act appears to have introduced a statutory force majeure regime. Under Section 7 of the COVID-19 Act, a non-defaulting party is not entitled to exercise his rights if the defaulting party satisfies the following criteria –

(a) Firstly, there is an **inability to perform a contractual obligation;**

(b) Secondly, the said contractual obligation arises from **one of the seven categories of contracts specified** in the Schedule; and

(c) Thirdly, the inability to perform **must be due to the measures prescribed**, made or taken under the **Prevention and Control of Infectious Diseases Act 1998** (PCID) to control or prevent the spread of COVID-19.

The 1st criterion appears rather simple – that the defaulting party must show that he was unable to perform the contractual obligation instead of a mere refusal. The standard of proof in civil courts require only proof on the balance of probabilities, hence, this criterion may likely be satisfied if the defaulting party can prove that in spite of its willingness to comply with a contractual obligation, their performance was impeded by an external factor (discussed below).

Applicability Of Section 7

Under the 2nd criterion, the contractual obligation must arise from one of the seven categories listed in the Schedule. Relevant to the construction industry would be the first two categories in the Schedule:

> *"1. Construction work contract or construction consultancy contract and any other contract related to the supply of construction material, equipment or workers in connection with a construction contract*
>
> *2. Performance bond or equivalent that is granted pursuant to a construction contract or supply contract"*

It should be noted here that "construction work" is loosely defined and it is unclear whether it only refers to the actual process of construction (which is to build something from scratch), or whether it includes repair works procured in the course of operations, or for maintenance purposes. In this regard:

(a) Guidance may be sought from the Construction Industry Payment and Adjudication Act 2012 (CIPAA) which has a very elaborate definition of "construction work". Under CIPAA, construction work includes repair and maintenance work.

(b) However, if the legislator had intended for the definitions under CIPAA to apply to the Act, it would have expressly been stated. For example, the sixth category of contract has been defined as:

> *"Contract by a tourism enterprise as defined under the Tourism Industry Act 1992…"*

Dispute may also arise out of the 3rd criterion, in that the inability to perform "*must be due*" to the measures prescribed, made or taken under the PCID. An example of a measure prescribed, made or taken under the PCID would be the MCO. In this regard, it is unclear whether the cause of such inability must be "*directly or indirectly*" caused by the MCO.

It should also be noted that the applicability of Section 7 is narrow. It only applies if a party's inability to perform a contractual obligation was caused by a measure prescribed under the PCID – in contrast with Singapore's version of the law which applies to a "*COVID-19 event*". Hence, even if the defaulting party is unable to perform its obligations due to policies implemented by other countries, the defaulting party will not be able to avail itself of any relief from Section 7. It is further unclear in the event of concurrent causes, whether the MCO (or any other measure prescribed under the PCID) needs to be the *dominant* causing event for this third criterion to apply.

In spite of the above, Section 10 of the Act provides that any action taken before 23 October 2020 will not be caught by Section 7. For example, if an Employer has terminated or imposed liquidated damages (LAD) on the contractor prior to 23 October 2020, the contractor will not be able to avail itself of any relief under Section 7.

Suspension Of Extinguishment of Rights?

Whilst it is clear that the Act shall be operational between 18 March 2020 and 31 December 2020 (unless extended further) (Relevant Period), the way it operates is ambiguous in that it is unclear whether Section 7 was intended to completely extinguish the right to enforce a contractual obligation during the Relevant Period or merely suspends such rights temporarily.

For example, if a contractor may be contractually required to complete construction works by 30 August 2020, the restrictions of the MCO caused the contractor to achieve completion only on 30 January 2021, a delay of five months. Under Section 7, the Employer could not exercise its right to recover the LAD while the Act is still in force, until after 31 December 2020. Once the Act is no longer in force, would the Employer be entitled to claim for five months of delay (between 30 August 2020 to 30 January 2020), or would he only be entitled to claim between 1 January 2021 to 30 January 2021? This ambiguity will certainly give rise to disputes in the construction sector.

Settlement Of Disputes?

Interestingly, under Section 8, the Act provides for an out-of-court resolution process, that is by way of mediation. If parties agree to mediate under the Act, the Minister will determine the mediation process including the appointment of the mediator. Upon conclusion parties will be required to enter into a final and binding settlement agreement.

Of noteworthy however, mediation under Section 8 is optional and completely voluntary and it will **not** be applicable if parties do not agree to refer their disputes to mediation. Accordingly, despite the legislator's intention to promote a speedy out of court settlement, disputes will nevertheless most likely end up in arbitration or court litigation.

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Moving Forward

There will be inevitable disputes in the construction industry due to the ambiguity of Section 7 of the COVID-19 Act. Accordingly, parties to a construction contract are reminded to document the impact the pandemic has on their projects, and to keep a proper record of such documentations as they may ultimately determine the outcome of future disputes.

Authored by Abang Iwawan[1].

Should you have any queries, please contact the author or his team partners, Datuk DP Naban and Rosli Dahlan.

How can we help you?

We are operating as usual and clients may pose any queries including those in relation to this alert via e-mail or telephone to:

- **Datuk D.P. Naban**
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